STATE OF MICHIGAN

COURT OF APPEALS

BETH A. O'SULLIVAN,

Plaintiff-Appellant,

v

THE GREENS AT GATEWAY ASSOCIATION,

Defendant-Appellee,

and

SALVATORE CATTONE, GATEWAY CONDOMINIUM, LLC, CATTONE DEVELOPMENT COMPANY, d/b/a CHIPPEWA HOMES, and JAMES BROTHER'S LANDSCAPE AND POND SUPPLY COMPANY,

Defendants.

UNPUBLISHED
August 12, 2010

No. 290126
Wayne Circuit Court
LC No. 2006-632442-NO

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant, The Greens at Gateway Association. We affirm in part, reverse in part, and remand for further proceedings.

Defendant, The Greens at Gateway Association (hereafter "defendant"), is the homeowners' association responsible for managing The Greens at Gateway, a condominium complex. Plaintiff resides at the complex, having purchased a condominium there in approximately 2001. According to plaintiff, she immediately noticed a problem with excessive drainage from the roof of her condominium, which caused water to overflow the gutters and spill onto her porch. Despite complaints to the developers of the complex, the drainage issue was never resolved.

Pursuant to the disclosure statement applicable to the condominium complex, the developer reserved the right to control the Association Board of Directors until up to "four and one half (4-1/2) years after the first sale or the sale of seventy-five percent (75%) of the entire

Project." Peter Bedder, the president of the homeowners' association, testified in his deposition that the developer relinquished control pursuant to these provisions in the third week of January 2005.

In February 2005, ice had formed on the walkway at the base of the steps leading to plaintiff's condominium, allegedly as a result of the faulty drainage. Plaintiff stepped off her steps onto the walkway, slipping and falling on the ice and incurring serious injuries. Plaintiff thereafter initiated the instant lawsuit against defendant and others, asserting various causes of actions including premises liability, nuisance, and negligence.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), contending that the icy condition complained of was open and obvious with the existence of no special aspects that would serve to remove it from the protections afforded by the open and obvious doctrine. Defendant also argued that plaintiff could not establish that defendant's failure to remedy the allegedly defective condition caused her injuries. At oral argument on the motion, plaintiff withdrew her premises liability claim, but asserted that her claims of negligence and nuisance still stood.

The trial court ruled that the developer had a duty to use due care in constructing the condominium units that could not be subsumed into a premises liability theory, but that "the Association comprising condo owners can't be held liable for the torts of the developer or builder" under MCL 559.209. It stated, "Plaintiff can't hold the Association comprising the condo owners liable unless she can point to a duty contemporaneous with the owners' takeover," under either a premises liability theory, which plaintiff relinquished, or nuisance. The trial court then noted that both plaintiff's nuisance claim and her negligence claim were essentially dressed-up versions of her now-relinquished premises liability claim and granted summary disposition in defendant's favor. This appeal followed.

This Court reviews a trial court's resolution of a summary disposition motion de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed*, 475 Mich at 537. The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of any material fact. *Id.*

This matter also involves the application and interpretation of a statute, MCL 559.209. The proper construction and application of a statute presents a question of law that this Court reviews de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

On appeal, plaintiff first contends that the trial court erred in determining that her action was, in substance, a premises-liability claim disguised as a claim for ordinary negligence or nuisance. We agree.

In a premises liability claim, liability emanates from the defendant's duty as an owner, possessor, or occupier of land. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005).

Plaintiff correctly recognized that her action does not involve a premises liability claim because she was the possessor of the property on which her injury occurred. Our Supreme Court has distinguished torts based on premises liability from torts based on ordinary negligence on the ground that the former addresses an injury that arises from a condition of the land, whereas the latter arises from the defendant's activity or conduct. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Here, plaintiff alleges that defendant caused her injury by failing to correct the roof and gutter condition that caused her porch and walkway to become slippery. Accordingly, this claim entails ordinary negligence, not premises liability.

Nuisance, plaintiff's other claim, is an interference with a property owner's use and enjoyment of property. *Traver Lakes Community Maintenance Assoc v Douglas Co*, 224 Mich App 335, 344-345; 568 NW2d 847 (1997). In *Buckeye Union Fire Ins Co v Mich*, 383 Mich 630, 636; 178 NW2d 476 (1970), our Supreme Court stated:

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care (like a hole in a highway), but may still exist as a dangerous, offensive, or hazardous condition even with the best of care.

A plaintiff claiming a nuisance in fact "must show significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of the property." *McDowell v City of Detroit*, 264 Mich App 337, 349; 690 NW2d 513 (2004), rev'd on other grounds 477 Mich 1079 (2007) (citation and internal quotation marks omitted).

Plaintiff's allegation that her use and enjoyment of her property was interfered with by a condition that existed on property controlled by defendant arguably establishes a nuisance. Because plaintiff's claim is principally based on defendant's alleged failure to act, it may better fit an ordinary negligence theory. *Fuga v Comerica Bank-Detroit*, 202 Mich App 380, 383; 509 NW2d 778 (1993), abrogated on other grounds in *Xu v Gay*, 257 Mich App 263, 267-268; 668 NW2d 166 (2003). In either event, though, plaintiff's assertion of nuisance and negligence claims cannot be considered a mere attempt to create "by fiat" claims other than premises liability. Though there may be some overlap, the claims have distinctly different elements and plaintiff adequately set forth a basis for each cause of action.

Though we find that the trial court improperly categorized plaintiff's claims as all being based upon a premises liability theory, such finding, alone, does not resolve this matter. Instead, the questions become whether plaintiff's claims for nuisance and negligence can withstand summary disposition, and whether MCL 559.209 bars plaintiff's claims in any event.

Plaintiff, naturally, asserts that summary disposition was inappropriate with respect to her nuisance claim. As previously indicated, nuisance is an interference with a property owner's use and enjoyment of property. *Traver Lakes Community Maintenance Ass'n*, 224 Mich App at 344-345. "Liability for nuisance may be imposed where (1) the defendant has created the nuisance, (2) the defendant owned or controlled the property from which the nuisance arose, or (3) the defendant employed another to do work that he knew was likely to create a nuisance." *Traver Lakes*, 224 Mich App at 345. The Court in *Traver Lakes* further explained:

> Unlike negligence, "[n]uisance is a condition and not an act or failure to act." *Hobra v Glass*, 143 Mich App 616, 630; 372 NW2d 630 (1985), quoting 58 Am Jur 2d, Nuisances, § 3, p 557. In addition, unlike in a negligence claim, liability for trespass may be imposed regardless of the defendant's negligence or intentional conduct. *Hadfield* [*v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988)]. Thus, in reviewing plaintiff's damages claim for trespass/nuisance, we must focus our inquiry on the reasonableness of the interference with plaintiff's property, not the reasonableness of defendants' conduct in creating or maintaining the interference. See Prosser & Keaton, Torts (5th ed), § 87, pp 622-623.

Here, plaintiff's claim is based on an allegedly defective roof structure, controlled by defendant, that causes water in the gutter to overflow onto the limited common elements in plaintiff's possession. As previously indicated, this could be viewed as a condition that unreasonably interferes with plaintiff's property. However, as argued by defendant, pursuant to MCL 559.209 it cannot be held liable for nuisance because it did not design or build the defective roof and gutter.

MCL 559.209 provides as follows:

> Neither the association of co-owners nor the co-owners, other than the developer, shall be liable for torts caused by the developer or his agents or employees of the developer within the common elements.

This statute does not provide general immunity for an owners' association, but immunizes it from liability for torts caused by the developer or the developer's agents.[1] The key word here is *caused*.[2] Although defendant assumed control over the common elements, the statute exempts an owners' association from liability that was *caused* by the developer. The faulty roof design (the condition forming the basis for plaintiff's nuisance claim) was caused by the developer, not defendant. Accordingly, defendant was entitled to summary disposition of plaintiff's nuisance claim.

Plaintiff next claims that summary disposition was inappropriate with respect to her negligence claim. To establish a prima facie case of negligence, a plaintiff must prove: (1) that

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[1] The Legislature imposed continuing liability on the developer in MCL 559.237, which provides that "[t]he obligations of the developer to condominium unit purchasers and to the association of co-owners shall not be affected by the transfer of the developer's interest in the condominium project."

[2] When faced with questions of statutory interpretation, courts must discern and give effect to the Legislature's intent as expressed in the words of the statute. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Where language is unambiguous, it must be presumed that the Legislature intended the meaning clearly expressed, and no further judicial interpretation is permitted. *Id.*

the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and, (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Plaintiff maintains that defendant had a duty to maintain the common elements in a safe and proper manner, that it breached that duty by failing to correct the gutter and roof defect, and that she was proximately injured by this breach when she fell on the ice patch that had accumulated as a result of the gutter flow.

Defendant again argues that MCL 559.209 bars any liability for negligence because the gutter/roof defect was caused by the developer. As stated previously, MCL 559.209 does not provide blanket immunity to defendant; it only negates liability for a tort *caused* by the developer. This prompts the question whether a negligence claim can be attributed to the developer where the plaintiff's alleged injury arose from the owners' association's failure to *correct* a potentially dangerous defect that was caused by the developer. This question requires consideration of a condominium owners' association's duties to individual unit owners, and the effect that the change of the developer's directorship had on defendant's exposure to liability.

This Court has not directly addressed the liability of a condominium owners' association to individual unit owners who are injured in the common areas of the condominium complex. It is well established, however, that a landlord owes a duty of care to tenants with respect to common areas of a leased premises that are under the landlord's control. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008.) In *Stanley v Town Square Coop*, 203 Mich App 143; 512 NW2d 51 (1993), this Court applied this principle by analogy to the management association for a cooperative apartment development. In *Stanley*, the plaintiff was assaulted in the parking lot of a cooperative apartment where the plaintiff had been visiting a friend. *Id.* at 145-146. The plaintiff brought a premises-liability action against the cooperative and its management agent. *Id.* This Court considered, as a "preliminary matter, . . . whether prior judicial decisions discussing the duty owed in the landlord/tenant context are applicable in this case." *Id.* at 146. The Court stated:

> Because a landlord exercises exclusive control over the common areas of the premises, the landlord is the only one who can take the necessary precautions to ensure that the common areas are safe for those who use them. Similarly, a cooperative association has exclusive control over the common areas of the cooperative, and the association is the only one that can act to make the common areas safe. We are satisfied that with regard to premises liability, the duty a cooperative association owes those who come on the premises is the same as the duty a landlord owes those who come on its premises. [*Id.*]

This reasoning applies with equal force to defendant. Pursuant to the bylaws, defendant association held exclusive control over the common areas of the condominium, including the roof. Individual unit owners were not permitted to make their own alterations to the common areas; defendant alone had the right and authority to do so. This relationship is precisely analogous to the landlord-tenant relationship and the relationship in *Stanley*. Accordingly, defendant had a duty to maintain the common areas in a safe and reasonable fashion.

The essence of the tort of negligence is the defendant's conduct in acting or failing to act. *Id.*; *Fuga*, 202 Mich App at 380. Defendant's alleged failure to correct the recurring overflow

problem after the developer relinquished control over the directorship was not caused by the developer. Consequently, once the developer relinquished control to defendant[3], defendant's continued failure to correct the allegedly defective roof could be considered tortious conduct no longer caused by the developer. After the developer relinquished control, a short time before the incident at issue occurred, it became possible for the association to commit a tort not caused by the developer. Defendant is thus subject to liability for its own failure to correct a condition causing a recurring hazard.

Having established a duty on the part of defendant, not encompassed within the liability bar set forth in MCL 559.209, the next element for our consideration is whether defendant breached its duty of care to plaintiff. *Case*, 463 Mich at 6. "In a negligence case, the standard of conduct is reasonable or due care." *Moning v Alfono*, 400 Mich 425, 443; 254 NW2d 759 (1977). The actor must conform to the standard of conduct for a reasonable person under similar circumstances. *Id.*, citing Restatement 2d, Torts, § 283 and Prosser, Torts, § 53, p 324.

Defendant contends that there is no evidence that it breached any duty to plaintiff. It is premature, however, to consider whether this serves as an alternative ground to affirm the trial court's order of summary disposition. Defendant did not raise this issue as a basis for dismissing plaintiff's claims in its motion for summary disposition. A motion under MCR 2.116(C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue of material fact. MCR 2.116(G)(4). Because defendant did not identify this issue as a basis for summary disposition, plaintiff had no obligation to produce evidence to establish a genuine issue of material fact with respect to this element. See, e.g., *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Defendant also argues that plaintiff cannot establish a genuine issue of material fact regarding causation.[4] It contends that plaintiff merely speculates that the icy patch resulted from water that ran over the gutter and froze on the walkway. We disagree.

A plaintiff must offer more than a "mere possibility" or "plausible explanation" in order to establish that the defendant's negligent conduct was the cause of her injuries. *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004). A valid theory of causation must

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[3] The association's exposure to liability for negligence began with the change of directorship.

[4] Defendant argued before the trial court that that it had no duty to protect plaintiff from the hazard of the icy patch because the slippery condition is an open and obvious hazard. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, in *Hiner v Mojica*, 271 Mich App 604, 615-616; 722 NW2d 914 (2006), this Court held that the open-and-obvious danger doctrine is applicable only to premises-liability actions and product liability cases involving a failure to warn, and is not applicable to claims of ordinary negligence. Accordingly, to the extent that plaintiff's claim is properly viewed as one for ordinary negligence, the doctrine does not apply.

be based on facts in evidence. *Id.* The evidence need not negate all other possible causes, but it must exclude other reasonable hypotheses with a fair amount of certainty. *Id.*

Plaintiff offered evidence of a recurring pattern of water from rain and melted snow running off the roof and onto the pavement below because the gutter could not handle the volume. She offered evidence that she reported this problem to the condominium management before her fall, and provided photographs (albeit taken before her fall) showing an accumulation of ice on her walkway and porch. Mr. Bedder also testified that he and other owners were aware of the drainage problem resulting from the poor roof design (though not the specific problem of ice forming on plaintiff's porch). This evidence was sufficient to allow a trier of fact to infer that the ice patch on which plaintiff fell formed as a result of this repeating process. Moreover, plaintiff testified that it had not rained or snowed on the day of the accident. Plaintiff thereby excluded other likely explanations for the patch of ice. Defendant does not offer any alternative hypotheses for the formation of the ice. At the very least, questions of material fact exist regarding causation, thus precluding summary disposition pursuant to MCR 2.116(C)(10).

We affirm the trial court's order granting summary disposition in defendant's favor with respect to plaintiff's nuisance claim, but reverse the order to the extent it grants summary disposition on plaintiff's negligence claim and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto